UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DANIEL F. CLARK,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-55-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises issues concerning the appropriate date upon which to calculate the age of a claimant when the Medical-Vocational Guidelines, Appendix 2 to Subpart P, 20 C.F.R. § 404 ("the Grid"), are applied to a claim for benefits, whether the commissioner erred by failing to consider the plaintiff's non-exertional impairments at Step 5 of the sequential evaluation process, and whether the commissioner erred in determining the plaintiff's residual functional capacity at Step 4 of that process. I recommend that the court affirm the commissioner's decision.

[1] This action is properly brought under 42 U.S.C. § 405(g). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 18, 1998 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on December 24, 1985, the date upon which he stated he became unable to work, and had acquired sufficient quarters of coverage to remain insured only through December 31, 1993, Finding 1, Record pp. 23-24; that the plaintiff had not engaged in substantial gainful activity since December 24, 1985, Finding 2, Record p. 24; that on the date his insured status expired the plaintiff suffered from neck and low back injuries, impairments that were severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 24; that the plaintiff's testimony concerning his impairments and their impact on his ability to work on the date his insured status expired were not entirely credible in light of his description of his activities and lifestyle, the degree of medical treatment required, and the reports of the treating and examining medical practitioners, Finding 4, Record p. 24; that on the date his insured status expired the plaintiff retained the residual functional capacity to perform a full range of light work, with no significant non-exertional limitations that would narrow the range of work he was then capable of performing, Findings 5 & 7, Record p. 24; that the plaintiff was unable to perform his past relevant work in the coating room of a paper mill, Finding 6, Record p. 24; that, considering the plaintiff's age on the date of onset of his disability (42), high school education, semi-skilled work experience without transferable work skills, and residual functional capacity, he was able to make a successful vocational adjustment to work that exists in significant numbers in the national economy, including self-service gas station attendant, parking lot attendant, cafeteria worker and hand packer, and accordingly was not disabled within the meaning of the Social Security Act at

any time through the date upon which his insured status expired, Findings 8-12, Record pp. 24-25. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*.., 647 F.2d 218, 222 (1st Cir. 1981).

I. Discussion

A. Light Work

At oral argument, the plaintiff's counsel made clear that the plaintiff's challenge to the commissioner's finding at Step 5 of the sequential evaluation process that he could perform the full range of light work "because the ALJ failed to take into account that the claimant was unable to walk significant distances," Itemized Statement at 5, is also the basis for his challenge to the administrative law judge's calculation of his age. That is, the question whether the plaintiff's age should be calculated as 42 or 50 makes a difference in application of the Grid only if the plaintiff's residual function capacity is for sedentary rather than light work. *See* Appendix 2 to Subpart P, 20 C.F.R. § 404, §§ 201.14, 202.21. The plaintiff does not suggest what the commissioner's finding concerning residual functional capacity should have been. He merely points out that light work is defined at 20

C.F.R. § 404.1567 to require "a good deal of walking or standing."

I must assume that the plaintiff means to rely on his own testimony concerning his ability to walk, which is found at pages 64-65 of the record. While the initial question concerning back pain which elicits the testimony concerning walking asks the plaintiff to "focus on how you've been . . . since around the time you turned 50," Record p. 64, a birthday which occurred some two months before the date last insured, it is clear from the plaintiff's testimony that he is discussing his current ability, at the time of the hearing in 1996, rather than the time before the date last insured.

There is medical evidence in the record to support the plaintiff's testimony on this point, and it is relevant to the period before the date last insured. Michael W. Mainen, M.D., examined the plaintiff on or about April 9, 1992 and "suggest[ed]" that the plaintiff "does not tolerate walking and should not have to walk more than a block at a time without at least five minutes of standing or sitting." *Id*. p. 229. Dr. Mainen also opined that "[t]here is no question that Mr. Clark has significant residual work capacity. I would return him to work of at least light/medium physical demand." *Id.*

Ability to walk only a limited distance is not necessarily incompatible with a finding that the claimant has a residual functional capacity for light work. *E.g.*, *Fenton v. Apfel*, 149 F.3d 907, 911-12 (8th Cir. 1998) (claimant able to walk only ten blocks); *Diaz v. Chater*, 55 F.3d 300, 306-07 (7th Cir. 1995) (claimant able to walk only three blocks). *But see Rivera v. Chater*, 942 F. Supp. 178, 185 (S.D.N.Y. 1996) (examining consulting physician's finding that claimant had limited ability to walk long distances "directly contradicts" conclusion that claimant could perform full range of light work). In addition, the administrative law judge in this case did not simply find that the plaintiff was capable of a full range of light work. He consulted a vocational expert and as a result of that

testimony specified four jobs which the plaintiff could perform. The plaintiff has not offered any authority in support of his argument that Dr. Mainen's limitation on walking is incompatible with each or any of the specific jobs which the administrative law judge found him capable of performing: self-service gas station attendant, parking lot attendant, cafeteria worker, and hand packer. Finding 11, Record p. 50.

It is not apparent to me that any of these jobs requires regular walking for a distance of more than one block, let alone walking such a distance without five minutes of sitting or standing. I have reviewed the entries for each of these jobs in the Dictionary of Occupational Titles and find none of the descriptions inconsistent with such a limitation. *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. Rev. 1991), §§ 211.462-010 (cashier II, including self-service gasoline cashier, cafeteria cashier, and parking lot cashier), 915.473-010 (parking lot attendant), & 920.587-018 (hand packager). Accordingly, even if the administrative law judge's conclusion that the plaintiff was capable of a full range of light work without the significant non-exertional limitation of ability to walk only one block before sitting or standing was in error, his conclusion that the plaintiff was capable of performing four specific jobs that existed in significant numbers in the national and regional economies was not without substantial evidentiary support in the record. The challenge to the commissioner's decision on this basis therefore may not succeed.

B. Calculation of Age

As noted above, the plaintiff contends that the administrative law judge erred in using the date of his alleged onset of disability to calculate his age for the purposes of applying the Grid rather

than the date last insured.[2] That contention makes no difference if, as I conclude, the commissioner did not err in determining that the plaintiff has the residual functional capacity for light work.

Even if this were not the case, the plaintiff, who has been represented by the same law firm throughout, failed to raise this issue in his appeal to the Appeals Council. Record pp. 14-16. This failure waives the issue for purposes of judicial appeal. *James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) (citing cases from six other circuits); *see Gonzalez-Ayala v. Secretary of Health & Human Servs.*, 807 F.2d 255, 256 (1st Cir. 1986) (failure to raise issue in request for review by Appeals Council or before district court constitutes waiver). The plaintiff is accordingly not entitled to pursue this issue here.

C. Non-exertional Limitations

Without citation to authority, the plaintiff contends that the administrative law judge erred at Step 5 of the evaluation process by failing to include in his question to the vocational expert two non-exertional limitations: "pain, tingling, shaking, and loss of sensation in his hands" to which he testified at the hearing and "pain and weakness in his arms and legs" which he mentioned in his written response to a physical questionnaire. Plaintiff's Itemized Statement of Specific Errors (Docket No. 4) at 5. However, the plaintiff specifies the hypothetical question to which he objects as that posed at page 85 of the record. It is clear from the administrative law judge's decision that he did not rely on the vocational expert's answer to this hypothetical question in reaching his conclusions, because the answer was that the plaintiff would not be capable of any job. Record pp.

[2] Counsel for the plaintiff contended at oral argument that the plaintiff had "amended" his onset date at the hearing before the administrative law judge to the date last insured, and that the administrative law judge agreed to this amendment. I do not read the transcript of the hearing to necessarily lead to that conclusion, Record p. 60, but in any event resolution of this issue is not required under the circumstances discussed above.

85-86. The administrative law judge found that the plaintiff had no significant non-exertional limitations and that the plaintiff was able to make a successful adjustment to several jobs available in the national economy. Findings 7 & 11, Record p. 24. The administrative law judge relied on the second hypothetical question, posed at page 86 of the record. Thus, the plaintiff could not have been harmed by the exclusion of any non-exertional limitations from the first hypothetical question. Furthermore, the plaintiff's counsel did not seek to add these two additional limitations to the first hypothetical posed to the vocational expert, although he was given an opportunity to do so. Record pp. 90-91. *See Torres v. Secretary of Health & Human Servs*., 870 F.2d 742, 746 (1st Cir. 1989).

Assuming that the plaintiff means to object to the second hypothetical question on this basis, the result does not differ. Most of the evidence cited by the plaintiff in support of his argument on this point fails to tie the alleged non-exertional limitations to the period before the date last insured, December 31, 1993. In fact, the cited testimony concerns the plaintiff's condition as of the date of the hearing, March 26, 1996; and the physicians' reports are dated April 14, 1995 (Michael W. Mainen, M.D., Record pp. 26-31) and July 8, 1997 (John W. Wickenden, M.D., Record pp. 290-91[3]). The only time-appropriate evidence offered by the plaintiff is his own statement on a "Physical Questionnaire" completed for an unidentified purpose and addressed to an unidentified party, dated May 23, 1995, that he had pain and weakness in his "arms, legs and back up to neck" that began on August 24, 1984 and "has gotten worse" since then. Record pp. 256-58. This evidence does not support the first claimed non-exertional impairment, relating to hands, and that alleged failure by the

[3] The plaintiff also seeks to rely in this regard on Dr. Wickenden's statement that, as of July 8, 1997, he "has no 'reliable full time work capacity.'" Record p. 291. Even if this conclusion were directed to the appropriate time period, it is the sole province of the Commissioner to determine whether a claimant is disabled for purposes of the Social Security Act. Opinions by medical practitioners on this issue do not govern. 20 C.F.R. § 404.1527; *Rodriguez v. Celebrezze*, 349 F.2d 494, 496 (1st Cir. 1965).

administrative law judge cannot be considered further.

As evidence to support the second claimed non-exertional impairment, the questionnaire is of course entirely subjective. "A symptom is an individual's own description of his . . . physical or mental impairment(s). Under the regulations, an individual's statement(s) about his . . . symptoms is not enough in itself to establish the existence of a physical or mental impairment or that the individual is disabled." Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service*, Rulings 1983-1991 (Supp. 1997-98) at 118. The plaintiff offers no citation to the record to support his statement in the questionnaire concerning pain and weakness in his legs and my review of the medical records does not reveal evidence of any underlying medically determinable impairment that could reasonably be expected to produce these symptoms. Accordingly, the administrative law judge did not err by failing to find pain and weakness in the plaintiff's legs as a significant non-exertional limitation on his residual functional capacity.

The plaintiff does cite some medical evidence that supports his report of pain and weakness in his arms, but again it is evidence of an impairment existing well after the date last insured. The administrative law judge included arm pain in his first hypothetical, however, so I will assume for purposes of this argument that there is some evidence in the record of an underlying physical impairment before the date last insured. At this point in the analysis the administrative law judge must evaluate the intensity, persistence and limiting effects of the symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities. SSR 96-7p at 118. In this case, the administrative law judge undertook such an evaluation, which required an assessment of the plaintiff's credibility, based on a consideration of the entire record. *Id.*; *Gray v. Heckler*, 760 F.2d 369, 374 (1st Cir. 1985).

The administrative law judge found that "[t]he claimant's statements concerning his impairments and their impact on his ability to work are not entirely credible in light of the claimant's own description of his activities and life style, the degree of medical treatment required, and the reports of the treating and examining practitioners." Record p. 21. He provided specific findings to support this conclusion. *Id*. pp. 21-22. He was entitled to conclude that the arm pain and weakness did not constitute a significant non-exertional impairment limiting the plaintiff's residual functional capacity. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 194-95 (1st Cir. 1987). *See generally* Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service*, Rulings 1983-1991 (Supp. 1997-98), at 125-31.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of December, 1998.

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David M. Cohen
United States Magistrate Judge